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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

ELBERT B. LINDSEY and
E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON,
Appellee.

No. 660

ANSWERING BRIEF OF APPELLEE

A. O. COLBURN,
RALPH E. FOLEY,
C. C. QUACKENBUSH,
Attorneys For Appellee.

LIST OF CASES

	Page
Andrus v. McCauley, et al, No. L. 1421, Federal District Court for the Eastern District of Washington, Southern Division, November 21, 1936	6
In re Blystone, 75 Wash. 286, 134 Pac. 827	6
Manning v. State, 7 Okl. Cr. 367, 123 Pac. 1029	7
Newcomb v. State, (Okl.), 213 Pac. 900	7
Porter v. State, 20 Okl. Cr. 355, 202 Pac. 1039	7
State v. Johnson, 141 Wash. 324	7
State v. Martin, 176 Wash. 637, 30 Pac. (2d) 660	7
State v. Nicholes, 135 Wash. 333, 237 Pac. 706	6

INDEX

Argument	4
Motion for Dismissal	3
Statement of the Case	4

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MOTION FOR DISMISSAL

Appellee moves for a dismissal of the petition for writ of certiorari herein on the grounds that the record shows conclusively that no Federal question of substance is raised, and further that in any event the jurisdiction of the Supreme Court of the United States does not attach.

STATEMENT OF THE CASE

Without waiving the above motion, appellee represents: That appellant E. R. Lindsey is an attorney at law (Tr. 26) and that appellant Elbert B. Lindsey is his son (Tr. 27), and that both appellants were convicted on September 14th, 1935 by a jury upon information filed in the superior court of the State of Washington, charging appellants with the crime of grand larceny, the substance of the offense being a check (Tr. 4) drawn on the Spokane and Eastern Trust Company in the amount of $40.00. The check was written by E. R. Lindsey (Tr. 30) and cashed for the face amount by Elbert B. Lindsey (Tr. 4). No funds of any nature were on deposit in the bank on which the check was drawn, nor had any credit arrangements been made for the same. Appellants appealed their conviction to the Supreme Court of the State of Washington and the conviction was affirmed by the court sitting *en banc* in the June, 1936 term. An order denying rehearing was made October 9, 1936.

ARGUMENT

The appellants attempt to invoke the jurisdiction of this Court on several premises, none of which raise any Federal question save and except the *ex post facto* feature of the Parole Board Act of 1935, and, as will be pointed out, appellants' contention in this regard is not of substance.

Appellants' offense was committed in April, 1935 and the Parole Board Act went into effect in June, 1935. Appel-

lants were tried in September, 1935 and sentenced under the Parole Board Act of June, 1935. Appellants completely overlook and fail to call to this Court's attention the general saving provision of the statutes of the State of Washington, Section 2006 of Remington's Revised Statutes, in effect at this time and at all times covered by these proceedings, reading as follows:

> "Sec. 2006. Repeal and amendment of criminal statutes—Saving clause presumed. No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed, or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein."

It is clear in the face of the above statute that the most

that appellants can ask for is a correction of an alleged improper sentence, which appellee does not concede.

The Supreme Court of the State of Washington has passed directly on this question in the cases of *In re Blystone*, 75 Wash. 286, 134 Pac. 827, and *State v. Nicholes*, 135 Wash. 333, 237 Pac. 706.

> "Where a court has exceeded its power in imposing a sentence, a new trial will not be ordered but the case will be remanded to the trial court for the imposition of the proper sentence and judgment."

A similar conclusion was arrived at in the Federal District Court for the Eastern District of Washington, Southern Division at Walla Walla, *Andrus v. McCauley et al*, Cavanah, District Judge, No. L. 1421, decided November 21st, 1936, and cited by appellants in their present petition for writ of Certiorari (Petition 63). Judge Cavanah, in deciding that issue, closes his opinion with this language:

> "In view of the conclusion thus reached, the petitioner is remanded to the custody of the sheriff of King County, Washington to be taken before the State Superior Court of King County and sentence properly imposed."

As in the *Andrus* case, under Sections 452 and 461, Title 28, U.S.C.A., the Federal District Court has complete jurisdiction for the disposition of this case.

The second contention of appellants invokes no Federal question. The claim is made that the certified copies of the records of conviction of both appellants were improperly in-

troduced in evidence. The Supreme Court of the State of Washington passed squarely on this question, following the uniform rule of the several states which holds that it is the verdict of the jury which determines the admissibility of records of conviction as affecting the credibility of witnesses. *State v. Johnson,* 141 Wash. 324, *Manning v. State,* 7 Okl. Cr. 367, 123 Pac. 1029; *Porter v. State,* 20 Okl. Cr. 355, 202 Pac. 1039; *Newcomb v. State* (Okl.), 213 Pac. 900; *State v. Martin,* 176 Wash. 637, 30 Pac. 2d) 660.

Another claim of appellants is that they were questioned by police officers without legal counsel present, but they fail to cite any authority showing that they have a constitutional right to legal counsel before they may be questioned by police officers.

Appellants further contend that the signed statements used against them on the trial were obtained under coercion and duress. The State Supreme Court fully answered this contention in the following language:

> "From the evidence, it can not be said that as a matter of law there was duress; but in any event R. R. S. 2151 provides: 'The confession of a defendant made under inducement with all the circumstances may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.' Certainly the record discloses much corroborating evidence to sustain the admissibility of the admissions."

The statements of Officers A. E. Aikman support the finding of the State Supreme Court (Tr. 11):

> "Q. (To Aikman) I will ask you to state what the fact is as to any force or threats or duress or anything of that kind in regard to obtaining a statement from Elbert B. Lindsey?
>
> "A. Absolutely none."

Other contentions of appellants in their petition are of a much less substantial nature and in no sense involve any Federal question.

It is therefore respectfully submitted that the petition for writ of certiorari be dismissed.

A. O. COLBURN,
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C. C. QUACKENBUSH,
Attorneys for Appellee.